

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
May 16, 2007 Session

**IN RE: M.D.E. a minor child, By M.E.G. and husband, N.G., v. J.J.C.**

**Direct Appeal from the Chancery Court for Washington County  
No. 35599 Hon. G. Richard Johnson, Chancellor**

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**No. E2006-00942-COA-R3-PT - FILED JULY 6, 2007**

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A Petition was filed to terminate the parental rights of the father, and the adoption of the child by the mother's husband. Following trial, the Trial Court determined by clear and convincing evidence the statutory ground of abandonment had been proven and that it was in the child's best interest that the father's parental rights be terminated. On appeal we affirm the Judgment of the Trial Court and remand.

**Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed.**

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and SHARON G. LEE, J., joined.

Clifton Corker, Johnson City, Tennessee, for appellant.

John S. Taylor, Johnson City, Tennessee, for appellees.

**OPINION**

**Background**

ME(G) and J.J.C. met in 1998. Their relationship began to deteriorate when J.J.C. was incarcerated for possession of marijuana in June 1999. A son was born to these parties, M.D.E., on January 6, 2000. M.E.(G) met N.G. in June of 2002, and they were married on December 31, 2002. They filed a "Petition for Adoption by Stepparent and for Termination of Parental Rights" in the Chancery Court for Washington County. At that time, J.J.C. was incarcerated in a federal facility in Lexington, Kentucky.

Petitioners presented two alternate grounds for termination, i.e., willful failure to visit and/or provide support during the four months immediately preceding incarceration, and engaging in conduct prior to incarceration which exhibited a wanton disregard for the welfare of the child.

After a five day trial, the Chancery Court determined that J.J.C.'s parental rights should be terminated:

This [Chancery] Court has determined by clear and convincing evidence that Respondent, Joshua Joel Curde, should have his parental rights terminated as he has "abandoned" said child pursuant to T.C.A. § 36-1-102(1)(A)(iv) and T.C.A. § 36-1-113(c) in that the said Joshua Joel Curde willfully failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent's incarceration and he had engaged in conduct prior to incarceration which exhibited a wanton disregard for the welfare of the child.

The Court further finds by clear and convincing evidence that termination of the Respondent's parental rights to this child is in the best interest of the child.

This Appeal ensued.

### **Issues on Appeal**

- A. Whether statutory grounds exist to terminate J.J.C.'s parental rights.
- B. Whether termination of his parental rights would be in the child's best interest.

### **Discussion**

The governing statutes require that one seeking to terminate parental rights must establish at least one statutory ground for termination.<sup>1</sup> T.C.A. § 36-1-113(c)(1) (2005); *State Dep't of Children's Servs. v. A.M.H.*, 198 S.W.3d 757, 761 (Tenn. Ct. App. 2006).

Because parental rights are a fundamental liberty interest, the party seeking to terminate those rights must prove the grounds by clear and convincing evidence. T.C.A. § 36-1-113(c); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); "Clear and convincing evidence" is 'evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.' *In re Valentine*, 546.

"Abandonment" is one of the statutory grounds for termination, and the Trial Court found clear and convincing evidence that J.J.C. "abandoned" M.D.E. pursuant to T.C.A.

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<sup>1</sup>The statutory grounds are listed at T.C.A. § 36-1-113(g).

§ 36–1–102(1)(A)(iv). Section 36–1–102(1)(A)(iv) defines abandonment, and the definition contains two alternate tests for abandonment. The first test asks whether the incarcerated parent “willfully failed to visit[,] . . . support[,] or . . . make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such . . . incarceration.” *Id.* The second test asks whether the parent “engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child.” *Id.* The Trial Court found clear and convincing evidence satisfying both tests and said:

J.J.C. willfully failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent’s incarceration and he had engaged in conduct prior to incarceration which exhibited a wanton disregard for the welfare of the child.

The father disputes the Trial Court’s conclusion that the evidence satisfied the first test for abandonment. The father argues that five months prior to his incarceration, he paid \$2,500.00, the equivalent of ten months child support. His incarceration began in September 2003, and the relevant time period extends from May through August 2003. Although the father did make a \$2,500.00 support payment in March of 2003, the amount was not sufficient to pre-pay any of the four months immediately preceding his incarceration. At the time he made this payment, he owed \$284.40 for March and \$2,515.04 for prior months. After the payment, he was still \$299.44 behind in his payments. He made no subsequent child support payments, and his obligations continued to accrue, and by the end of August, he owed \$1,493.92. Accordingly, he failed to support M.D.E. for four consecutive months immediately prior to his incarceration.

The father further argues that his failure to provide support was not “willful.” A “willful” failure to support a child exists “when a person is aware of his or her duty to . . . support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so.” *In re Audrey S.*, 182 S.W.3d at 864–65. The Trial Court found clear and convincing evidence satisfying the definition of “willful.”<sup>2</sup>

The father testified that he was aware of his duty to support M.D.E, but further that he did not have the capacity to satisfy his child support obligation because a knee injury prevented

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<sup>2</sup>Specifically, the Chancery Court stated,

Defendant was aware of his duty to support his son. Defendant had the capacity to support his son. Defendant did not support his son for the required period of time and Defendant has not demonstrated a justifiable excuse for his failure to support his son.

The Court finds that the Plaintiffs have carried their burden of proof by clear and convincing evidence.

him from earning income.

The evidence establishes that the father injured his knee on July 3, 2003, while playing volleyball. On July 4, 2003, he sought treatment at Holston Valley Medical Center's Emergency Department, and that hospital's records classified the injury as a sprain. He was treated with an ace bandage and a "knee immobilizer." He was discharged on the same date.

This injury does not explain why he was incapable of satisfying his May and June support obligations, and prior to the injury he worked for a landscaping company and was living with his father and using his father's vehicles for transportation. It would appear that his child support obligation was his only expense. His explanation for his failure to support M.D.E. during May and June was that he did not save any money.

Whether the injury rendered the father incapable of making child support payments in July and August hinges upon the credibility of his testimony. He testified that he did not return to work because "[he] knew that [he] would re-injure [his knee] if [he] even tried to go back to the job that [he] was working before." He testified that he had to wear a leg brace which extended from the top of his thigh to the bottom of his ankle and prevented his leg from bending and that he wore this brace for a month and a half following the injury. However, the Chancellor specifically found the father's "credibility to be poor. We afford great weight to the trial court's determinations of witness credibility . . . ." *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007).

The hospital's discharge records indicate that J.J.C. was able to walk out of the hospital and only needed to stay home two or three days from work if needed." His father testified that J.J.C. wore a knee brace, but the brace did not incapacitate him from the thigh down to his ankle. The mother testified that J.J.C. was not wearing a brace when he attended visitations, and the Trial Court specifically found her testimony "to be very credible." Clear and convincing evidence establishes that J.J.C. was aware of his duty to support M.D.E., had the capacity to do so, but made no attempt in the four consecutive months immediately preceding his incarceration.

The Trial Court also found that the plaintiffs established by clear and convincing evidence that the father had engaged in conduct prior to his incarceration which exhibited a wanton disregard for the welfare of the child.

Probation violations, repeated incarceration, criminal behavior, substance abuse and failure to provide adequate support or supervision for a child may alone or in combination, constitute conduct that exhibits a wanton disregard for the welfare of a child. *In re Audrey S.*, 182 S.W.3d at 866; *accord In re C.T.S.*, 156 S.W.3d 18, 25 (Tenn. Ct. App. 2004). Moreover, this test is not limited to the parent's conduct during the four months immediately preceding the parent's incarceration. *In re Audrey S.*, at 861-71. The evidence supports the Trial Court's basing termination also on this ground.

J.J.C. disputes the Trial Court's conclusion that termination of his parental rights is

in M.D.E.'s best interest. Courts shall consider, but are not limited to the factors set forth in T.C.A. § 36-1-113(I), to determine whether termination is in the child's best interest. Courts are not required to mechanically examine all nine factors. *State Dep't of Children's Servs. v. A.M.H.*, 198 S.W.3d 757, 768 (Tenn. Ct. App. 2006). Rather, the circumstances of each case determine the relevance of each factor; and under some circumstances a lone factor can be conclusive. *Id.*

J.J.C. does not currently have the capacity to create a safe home for M.D.E. He has been in federal custody since September 2003. His projected release date is October 2008. Following his release he will reside in a halfway house for six months, and does not complete his sentence until April 2009. Moreover, he has not established a meaningful relationship between himself and M.D.E, and the totality of the circumstances clearly establish there is clear and convincing evidence to demonstrate that the termination of the father's parental rights are in the child's best interest.

We affirm the Judgment of the Chancery Court and remand with the cost of the appeal assessed to J.J.C.

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HERSCHEL PICKENS FRANKS, P.J.